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Supreme Court, U.S.
FILED
SEP 26 1997
CLERK

No. 97-350

In The

Supreme Court of the United States

October Term, 1996

TAIWO OKUSAMI,

Petitioner,

vs.

PSYCHIATRIC INSTITUTE OF WASHINGTON, D.C. *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should grant certiorari in a case involving District of Columbia law of local application only.

Whether the Court of Appeals correctly upheld the dismissal of the antitrust allegations.

Whether this Court should grant certiorari where the D.C. Circuit's unpublished judgment order does not conflict with any decisions of the District of Columbia Court of Appeals.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding in the United States Court of Appeals for the District of Columbia Circuit are as follows:

1. Taiwo Okusami, M.D. who was the appellant below and is the petitioner in this Court;

2. Psychiatric Institute of Washington, D.C., an appellee below and respondent in this Court;

3. Howard A. Hoffman, M.D., an appellee below, and respondent in this Court;

4. Psychiatric Institutes of American, Inc., an appellee below and respondent in this Court; and

5. National Medical Enterprises, Inc., an appellee below and respondent in the Court.

RULE 29.6 LISTING

A. The Psychiatric Institute of Washington, D.C. is a District of Columbia corporation. It is a subsidiary of NME Psychiatric Properties, Inc., a Delaware corporation which is, in turn, a subsidiary of Tenet Healthcare Corporation. Psychiatric Institute of Washington, D.C. has no subsidiaries.

B. Psychiatric Institutes of America, Inc. was a Delaware corporation which has changed its name to NME Psychiatric Hospitals, Inc. It is a subsidiary of NME Specialty Hospitals, Inc., also a Delaware corporation, which is, in turn, a subsidiary of Tenet Healthcare Corporation. NME Psychiatric Hospitals, Inc. has no non-wholly owned subsidiaries.

C. National Medical Enterprises, Inc. was a Nevada corporation which has changed its name to Tenet Healthcare Corporation. It has no parent companies and its non-wholly owned subsidiaries are as follows:

(1) Surgical Services, Inc., a Florida corporation;

(2) Alabama Health Services, Inc., an Alabama corporation;

(3) Group Administrators, Inc., an Alabama corporation;

(4) Piedmont Health Alliance, Inc., a North Carolina corporation;

(5) Health Advantage Plans, Inc., an Alabama corporation;

(6) Tenet Choices, Inc., a Louisiana corporation;

(7) Lake Hospital and Clinic, Inc., a Florida corporation; and

(8) CareNet Health Systems, Inc., a Tennessee corporation.

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STATEMENT OF THE CASE

This case began more than ten years ago. On February 13, 1987, while employed by Group Health Association ("GHA"), a health maintenance organization, Doctor Taiwo Okusami filed an application for appointment to the medical staff of the Psychiatric Institute of Washington, D.C. ("PIW") a private psychiatric hospital located in the District of Columbia. Pending completion of his application and the approval process, Doctor Okusami was granted temporary admitting and clinical privileges, but was not assigned by GHA to treat any of its patients at PIW until July 2, 1987.

Thereafter, as part of the application process, the cases of several patients treated by Doctor Okusami were reviewed by the hospital's Patient Care Evaluation Committee ("PCEC"). This review raised concerns about the level of medical care being rendered by Doctor Okusami. On August 13, 1987 Doctor Okusami was approached by a physician member of the PCEC who sought to discuss these concerns. Doctor Okusami refused to discuss these matters with the committee member.

Doctor Okusami's refusal to discuss his patient care practices with a PCEC member was in violation of Medical Staff By-Laws, by which Doctor Okusami had agreed to abide as a condition of his temporary privileges. An emergency meeting was convened on the following day by the acting Medical Director of PIW, Doctor Lawrence Brain. At this meeting Doctor Brain informed Doctor Okusami that the latter's refusal to discuss the quality of patient care with a PCEC member was in direct conflict with Medical Staff By-laws. He was further advised that under the By-laws, as a physician holding only temporary privileges, he was subject to special requirements of supervision. Appendix D to Petition for Certiorari. Doctor Okusami again refused to discuss his treatment of patients at

the hospital, and refused to accept supervision. As a result of the Doctor's refusals to comply with the Staff By-laws, the Acting Medical Director revoked his temporary privileges. Appendix E-3 to Petition for Certiorari.

After a hiatus of approximately one year, Doctor Okusami contacted Doctor Hoffman, the Medical Director of PIW, to inquire about the status of his original application for appointment to the Medical Staff. Following an initial disagreement over the necessity for a new application, Doctor Okusami's application was forwarded to the Executive Committee of the Medical Staff, and eventually to the Hospital Board of Directors, where it was approved on June 13, 1989. Dr. Okusami chose, however, not to utilize the privileges afforded to him, and instead filed this case in the United States District Court for the District of Columbia on April 6, 1990.

Doctor Okusami's original complaint included twelve counts purporting to allege negligence, civil conspiracy, antitrust violations, conspiracy to commit antitrust violations, intentional interference with business relations, defamation and intentional infliction of emotional distress. After numerous attempts by Okusami to file a viable complaint, the District Court dismissed the fifth version for failure to state a claim.[1] Doctor Okusami appealed to the United States Court of Appeals for the District of Columbia Circuit, which unanimously affirmed the dismissal of all counts except those alleging negligence and intentional interference with business relations. A divided court remanded these claims to the District Court for further proceedings. *Okusami v. Psychiatric Institute of Washington,* 959 F.2d 1062 (D.C. Cir. 1992). (Hereinafter "*Okusami I*")

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1. A more complete rendition of the procedural history of this stage of the case is set forth in Judge Sentelle's opinion, concurring in part and dissenting in part, *Okusami v. Psychiatric Institute of Washington,* 959 F.2d 1062, 1067-68 (D.C. Cir. 1992), and is incorporated herein.

Upon remand, Doctor Okusami submitted a Motion for Summary Judgment, supported by memoranda and factual materials, and the Defendants, a Motion for Judgment as a Matter of Law, or in the alternative for Summary Judgment, similarly supported. Each also opposed the other's motion. On May 17, 1995, the District Court entered an Order granting the Defendants' Motion and denying that of Doctor Okusami. Appendix B to Petition for Certiorari.

Doctor Okusami again appealed, and on April 8, 1996 a different panel of the Circuit Court unanimously affirmed the District Court's Order in an unpublished opinion. Appendix A to Petition for Certiorari; *Okusami v. Psychiatric Institute of Washington, D.C.*, 81 F.3d 1147 (D.C. Cir. 1996) (Table). Applying well established principles of District of Columbia tort law, it held that Doctor Okusami had failed to support his claims with any evidence that the Respondents had intentionally interfered with his business relationships and that Doctor Okusami had adduced no evidence to demonstrate that he was entitled to recover for negligent infliction of emotional distress. Appendix A to Petition for Certiorari.

Nearly a year after this decision, the Doctor requested leave to file a petition for rehearing out of time. By order dated April 4, 1997, leave was granted, and simultaneously, the petition for rehearing was-denied. Appendix C to Petition for Certiorari. A subsequent request for rehearing in banc was denied on May 8, 1997. The Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS LARGELY PREMISED ON THE LOCAL LAW OF THE DISTRICT OF COLUMBIA.

The gist of Doctor Okusami's claims, save those advanced under federal antitrust law, is that PIW's revocation of his temporary privileges denied him procedural rights under D.C. Code § 32-1307, thereby causing him tortious injury cognizable under the common law of the District.[2] For this reason the Petition should be denied as to these claims. This Court has routinely declined to review both decisions based on statutes exclusively applicable to the District of Columbia, and decisions ". . .which declare the common law of the District." *Del Vecchio v. Bowers,* 296 U.S. 280, 285 (1935). *See Pernell v. Southall Realty,* 416 U.S. 363, 368-69 (1974).

D.C. Code § 32-1307 is part of a statutory scheme applicable exclusively to "health care facilities or agencies" operating within the District of Columbia, which creates certain procedural rights and remedies for health care professionals seeking credentials at these institutions. Moreover, this statute did not form the basis for the Court of Appeals' decision, as Doctor Okusami eschewed the specific remedies provided by it, and elected instead to assert common law tort claims. *Okusami I,*

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2. Petitioner's references to the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.* are a red herring. Petitioner advanced no claims pursuant to that statute, nor could he, since it does not create a private cause of action for physicians. *E.g. Hancock v. Blue Cross-Blue Shield of Kansas,* 21 F.3d 373, 374 (10th Cir. 1994). Nor did the Respondents assert the immunity defense created by the statute, since the actions complained of by Doctor Okusami preceded the Act's effective date as to state law claims. 42 U.S.C. § 11111(c).

959 F.2d at 1070-1082. (final amended complaint). In his Petition, he now asserts that the courts below erroneously rejected his claims of negligence and tortious interference with business relations, the only claims which survived his first appeal.[3] As review of Judgment/Opinion reproduced in Appendix A to Petition for Certiorari demonstrates, these claims were resolved by the straightforward application of District of Columbia tort law, and Fed. R. Civ. P. 56, as elucidated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).[4]

The rulings were correct, and in any event do not represent an "exceptional situation where egregious error has been committed," which would warrant the exercise of discretionary review in a matter involving only local District of Columbia law, *Fisher v. United States*, 328 U.S. 463, 476 (1946).

II.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF THE ANTITRUST CLAIMS.

Doctor Okusami appears to argue that the Court of Appeals erred in *Okusami I*, when it affirmed the dismissal of his antitrust claims, 959 F.2d 1064-66. The ruling was grounded on *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 777 (1984), where this Court held that a corporation, its wholly owned subsidiaries, and its officers are incapable of conspiring with each other for purposes of the antitrust law because they have a unity of interest.

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3. The Petition does not seek to resurrect the common law claims whose dismissal was affirmed in *Okusami I*.

4. Petitioner's question V concerning the application of Fed. R. Civ. P. 50 or 56, is frivolous. *Celotex, supra* makes it clear that the standard under either is identical, and in any event, the Respondents framed their Motion in the alternative. *See* Appendix A to the Petition for Certiorari.

In an attempt to avoid the strictures of *Copperweld,* Doctor Okusami now argues that his oft-amended complaint actually alleged a conspiracy which included non-employee physicians. Petition at 10. The short answer is that the amended complaint never so stated, and Doctor Okusami did not advance such an argument below. The Court of Appeals accurately described his pleading and argument as follows:

> . . . we note as a preliminary matter that the Complaint does *not on its face allege any agreement among the defendants.* By attributing form and intention to the indistinct figures discernible through the fog that is the complaint, *one with a particularly vivid imagination might think he sees there portrayed a conspiracy among the defendants* — the PIW, its two corporate parents, and Dr. Hoffman, "the President and Medical Director for the [PIW]."
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> * * *
>
> The *whole of the plaintiff's theory* as applied to the defendants before us is that although Dr. Hoffman may have been the agent for defendant PIW for some purposes, their interests were not as wed as the ties between a corporation and its officers or employees. . . .

Okusami I, 959 F.2d at 1065. (Emphasis added). The Court, however, could find nothing in the pleading to support the hypothesis that Doctor Hoffman's economic interests differed from those of the corporate co-defendants. Therefore, it properly affirmed the dismissal. *Okusami I,* 959 F.2d at 1065.

Doctor Okusami's citation to the anti-competitive language of D.C. Code § 32-1307(a) adds nothing to this analysis. Indeed, when this issue was before the Court of Appeals, he conceded at oral argument that this claim ". . . depends entirely upon the viability of the antitrust claims." *Okusami I*, 959 F.2d at 1066.

In sum, the antitrust claims were properly dismissed and no further review is warranted.

III.

THE D.C. CIRCUIT'S OPINION IS CONSISTENT WITH THE DECISIONS OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

Doctor Okusami appears to claim that the decision rendered in this case is somehow inconsistent with prior decisional law of the District of Columbia Court of Appeals.[5] In this regard, he makes reference to *Scott v. Jackson*, 596 A.2d 523 (D.C. 1991) and *Balkisoon v. Capitol Hill Hospital*, 588 A.2d 304 (D.C. 1984). Neither is inconsistent with the rulings in this case.

Scott v. Jackson, supra involved the discovery of peer review records in a medical malpractice case. It has nothing whatsoever to do with a physician's rights during the underlying peer review process. *See Jackson v. Scott*, 667 A.2d 1365 (D.C. 1995).[6]

Nor is the ruling in *Balkisoon v. Capitol Hill Hospital, supra*,

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5. The District of Columbia Court of Appeals is the highest court of the District of Columbia, similar to a state Supreme Court. *See Pernell v. Southall Realty, supra*, 416 U.S. at 368.

6. Petitioner's citation is to a prior decision in the same case, *Scott v. Jackson*, 596 A.2d 523 (D.C. 1991), where the District of Columbia Court of Appeals dismissed attempted interlocutory appeals from the discovery rulings.

inconsistent with the decision in this case. In *Balkisoon*, which arose before the enactment of D.C. Code § 32-1307, the District of Columbia Court of Appeals merely held that a hospital is required to follow the material provisions of its own by-laws when making privilege decisions. 558 A.2d at 308. There was no discussion of what, if any, torts were implicated by a hospital's failure to do so. *See* 558 A.2d 305 & n.1. In contrast, in the instant case, the Circuit Court focused on particular tort claims and evidence. It ruled that Doctor Okusami failed to adduce any evidence that the Respondents intentionally interfered with his business relationships, or that under the facts presented, he could avail himself of a claim for negligent infliction of emotional distress, as that tort exists under District of Columbia jurisprudence. Appendix A to Petition for Certiorari. There is no conflict at all with decisions by the District of Columbia Court of Appeals.

CONCLUSION

This case does not merit review by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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